

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Vincent Lawrence Barr,)	C/A NO. 2:08-4020-CMC-RSC
a/k/a Vincent L. Barr, a/k/a Vincent Barr,)	
)	
Plaintiff,)	
)	ORDER
v.)	
)	
Kingstree South Carolina Police)	
Department; Ackerman Ellerbee,)	
Municipal Judge; Chief Robert Ford;)	
Lt. Bobbi Lynn Smith;)	
Sgt. Name Unknown;)	
Officer Name Unknown,)	
)	
Defendants.)	
_____)	

This matter is before the court on Plaintiff's *pro se* complaint brought pursuant to 42 U.S.C. § 1983.

In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02 (B)(2)(d), DSC, this matter was referred to United States Magistrate Judge Robert S. Carr for pre-trial proceedings and a Report and Recommendation. On February 4, 2009, the Magistrate Judge issued a Report recommending that Plaintiff's motion to proceed *in forma pauperis* ("ifp") be denied and this matter be dismissed without prejudice and without issuance and service of process. The Magistrate Judge advised Plaintiff of the procedures and requirements for filing objections to the Report and Recommendation and the serious consequences if he failed to do so. Plaintiff filed objections to the Report on February 13, 2009.

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. *See Mathews v. Weber*, 423 U.S. 261 (1976). The court is charged with making a *de novo*

determination of any portion of the Report and Recommendation of the Magistrate Judge to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b).

After reviewing the record of this matter, the applicable law, and the Report and Recommendation of the Magistrate Judge, the court agrees with the conclusions of the Magistrate Judge insofar as he recommends denial of *ifp* status. Plaintiff contends in his objections that the cases referred to by the Magistrate Judge as having been counted in this court as “strikes” under 28 U.S.C. § 1915(g) were dismissed for “procedural defaults of failing to exhaust state remedies not for frivolous litigation or failure to state a claim.” Objections at 1 (Dkt. # 15, filed Feb. 13, 2009). This assertion is incorrect.

The Magistrate Judge recommends that Plaintiff’s motion to proceed *ifp* be denied and this matter dismissed under the “three strikes” provision contained in 28 U.S.C. §1915(g). However, § 1915(g) states that if a prisoner has three or more prior “strikes,” he may not bring suit “under this [the *in forma pauperis*] section” The court therefore disagrees with the Magistrate Judge’s recommendation that this matter be dismissed outright upon the denial of *ifp* status. Plaintiff must be given an opportunity to pay the full filing fee (\$350.00) in this court, and if Plaintiff pays the full filing fee, this court will then refer this matter to the Magistrate Judge to conduct a review of the complaint under 28 U.S.C. § 1915A.¹

¹The Report indicates that “a careful review has been made of the *pro se* complaint pursuant to the procedural provisions of 28 U.S.C. §1915 [and] 28 U.S.C. § 1915A” Report at 1 (Dkt. #12, filed Feb. 4, 2009). However, the Report contains no discussion of whether the complaint is subject to dismissal under the provisions of § 1915A.

Therefore, Plaintiff shall pay the full filing fee for this matter by **Friday, March 6, 2009**. Plaintiff's failure to pay the filing fee shall result in the dismissal of this matter without prejudice and without issuance and service of process. Should Plaintiff pay the filing fee, this matter shall be referred to the Magistrate Judge to conduct a review of Plaintiff's complaint under § 1915A.

IT IS SO ORDERED.

s/ Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
February 18, 2009

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